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actionable claim, we think that s. 135 is not applicable. That section says that, "where an actionable claim is sold, he, against whom it is made, is wholly discharged by paying to the buyer the incidental expenses," &c. The word *discharged* would be inapplicable to a suit of this description, because it is for possession of land. We are inclined to think that s. 135 refers to claims for money of some kind or the like, although the money claim may be a charge on immoveable property. On the whole, we are of opinion that Chapter 8, and specially s. 135, are not applicable to the facts of this case. That being so, the right of the plaintiffs being found in the judgment of the lower Courts, the decree of the lower Appellate Court will be set aside, and the plaintiffs' suit for possession will be decreed with costs in all the Courts.

K. C. M. *Appeal allowed.*

Before Mr. Justice Norris and Mr. Justice O'Kinealy.

1886. *August* 3.

BROJENDRO KUMAR ROY CHOWDHRY (PLAINTIFF) *v.* RASH BEHARI ROY CHOWDHRY AND OTHERS (DEFENDANTS).*

Right of suit—Cause of Action—Contribution, suit for—Joint wrong-doers—Breach of Covenant—Damages for breach of Contract—Breach of Contract.

In a suit for damages against *A* and others for breach of a covenant not to open a ferry at a particular place, a decree was obtained against all the defendants. The amount of this decree was levied by execution from *A* alone, who thereupon brought a suit for contribution against his co-defendants in the former suit. Both the lower Courts dismissed the suit on the ground that the plaintiff and the defendants had been joint wrong-doers, and that no suit for contribution would lie as between them. On second appeal to the High Court—

Held, that the rule of law relied on by the Courts below had no application to the circumstances of the present case, and that the plaintiff was entitled to maintain his action.

IN this case it appeared that a decree had been obtained by one Bhogowan Chunder Chowdhry against the plaintiff and the defendants jointly for the sum of Rs. 352-14-0 as damages for breach of contract. The whole amount was, in execution of the

* Appeal from Appellate Decree No. 1555 of 1885, against the decree of W. H. Page, Esq., Judge of Dacca, dated the 20th of April 1885, affirming the decree of Baboo Mohendro Nath Das, Munsiff of Manikgunj, dated the 18th of February 1884.

decree, recovered from the plaintiff alone on the 2nd of March 1881; and thereafter he, on the 24th of August 1883, instituted the present suit for contribution. The Court of first instance held that the plaintiff and the defendants had been joint wrong-doers in breaking the contract upon which Bhogowan Chunder Chowdhry sued, and that therefore the present suit for contribution would not lie—*Sreeputty Roy* v. *Lohâram Roy* (1); *Suput Singh* v. *Imrit Tewari* (2); *Ruttee Sirdâr* v. *Sajoo Paramanick* (3). The judgment of the lower Appellate Court on appeal is as follows:—

"I think that the judgment of the lower Court ought to be supported for the reasons given by the Munsiff. The defendants in the former suit executed an agreement not to open a ferry in the neighbourhood of a certain existing ferry and did so open a ferry in violation of the agreement. It seems to me that this constituted them wrong-doers in the sense that they knew or ought to have known that they were doing a wrong or unlawful act. I do not think it can be said at all that they were acting under a claim of right, however ill-founded; the act was a deliberate breach of the agreement into which they had entered, and therefore the Munsiff has rightly held that no suit for contribution would lie. The appeals are dismissed with costs."

The plaintiff appealed to the High Court. The facts of the case are fully set out in the judgment of Mr. Justice Norris.

Dr. *Rash Behary Ghose*, Baboo *Srinath Das*, and Baboo *Kali Charan Banerjee* for the appellant.

Baboo *Hem Chunder Banerjee*, Baboo *Sharoda Churn Mitter* and Baboo *Turuck Nath Paulit* for the respondents.

The following judgments were delivered by the Court (NORRIS and O'KINEALY, JJ.)

NORRIS, J.—The facts of this case are shortly as follows:—The predecessor of one Bhogowan Chunder Roy granted a miras settlement of certain lands in Kaunnara to the plaintiff and certain of the defendants. The ekrar contained a covenant by

(1) 7 W. R., 384.
(2) I. L. R., 5 Calc., 720.
(3) 11 B. L. R., 345; 20 W. R., 236.

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the grantees of the settlement not to interfere with or disturb a ferry ghât belonging to the grantor. In breach of this covenant the grantees established a ferry ghât near that of the grantor, who thereupon brought an action against the grantees for breach of covenant and obtained a decree. In execution of his decree the grantor attached certain property of the plaintiff, who, to avoid the sale of his property, satisfied the decree by paying the damages and costs amounting to Rs. 352-14.

The plaintiff's share in the maliki rights under the settlement was four annas, and he admitted that he was liable for ¼th of the Rs. 352-14, one of his co-sharers paid him Rs. 24 odd in respect of his 1a-2g-2k share, and the plaintiff brought this suit to recover the balance with interest from the surviving co-grantees, and the heirs and representatives of some who had died, according to their respective shares. The defendants 1, 4, 5, 6, 7, 8, 9, 10 and 13 did not appear. The defendants 2, 3, 11, 12 and 14 jointly filed a written statement; the defendant 15 filed a separate written statement; the defendants 16, 17 and 18 jointly filed a written statement. The Munsiff dismissed the suit as against all the defendants, holding that they were all wrong-doers, and that no suit for contribution lay, and upon the merits he dismissed the suit as against the defendants 10, 12, 14, and 15; he also held that the defendants 1, 2 and 3 were not liable for the costs of the appeals preferred to the lower Appellate Court and the High Court against the decree of the Munsiff awarding damages to the grantor. On appeal the District Judge upheld the Munsiff's decision, and from his judgment the plaintiff has appealed to this Court.

The Munsiff found "that the plaintiff and defendants made a conspiracy and opened a ferry ghât in violation of an agreement made by them in favour of the plaintiff in the damage suit, and it is clear that they knew that they were doing an illegal or wrong act; for this reason I hold that this suit is not tenable."

The District Judge says: "The defendants in the former suit executed an agreement not to open a ferry in the neighbourhood of a certain existing ferry, and did so open a ferry in violation of the agreement; it seems to me that this constituted them wrong-doers in the sense that they knew or ought to have known that

they were doing a wrong or unlawful act. I do not think it can be said at all that they were acting under a claim of right; however ill-founded, the act was a deliberate breach of the agreement into which they had entered." I am of opinion that both the Courts below have erred in treating the plaintiff and defendants as wrong-doers, and in their application of the well-known legal maxim that no contribution lies amongst wrong-doers. When the Munsiff speaks of a conspiracy the utmost that he can mean is that the plaintiff and defendants met together and deliberately agreed to break their covenant and establish a ferry ghât. This is not sufficient to constitute a conspiracy. To constitute a conspiracy there must be an agreement between two or more persons to do something either *malum prohibitum* or *malum in se*, or to do something which they are entitled to do only by illegal means. Suppose *A*, *B*, and *C* contract to deliver to *D* in Calcutta, on 1st January, 1,000 maunds of wheat at a certain price, and between the date of the contract and the date of delivery wheat has gone up in price, and *A*, *B*, and *C* meet together and say "we shall lose a lot of money on this contract, let us only deliver 500 maunds and leave *D* to sue us for damages." Could this be said to be a conspiracy? I think not; or suppose *A* and *B* agree to sell a piece of land to *C*, and between the date of the contract and the date fixed for the completion of the purchase, *A* and *B* hear that the piece of land is likely to be taken up for a railway or other public work, and that therefore they will in all probability get a much better price than *C* had agreed to give them, and agree not to convey to *C*, but to leave him to bring his action for damages; this would not be conspiracy. Three cases were relied upon by the Munsiff, *viz.*, *Sreeputty Roy* v. *Loharam Roy* (1); *Ruttee Sirdar* v. *Sajoo Paramanick* (2); and *Suput Singh* v. *Imrit Tewari* (3); all these cases are cases of tort. Here the plaintiff and defendants were guilty only of a breach of contract. The leading case of *Merryweather* v. *Nixon* (4) points out the distinction between contribution as between joint tort feasors and judgment against

(1) 7 W. R., 384.
(2) 11 B. L. R., 345; 2 W. R., 236.
(3) I. L. R., 5 Calc., 720
(4) 2 Smith's L C., 546.

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several defendants in an action of assumpsit: I am of opinion that the appeal should be allowed.

As the lower Appellate Court has not tried the case on the merits, it must be remanded to enable it to do so. Costs will abide the result.

O'KINEALY, J.—I concur in the decision of my learned colleague. The Judge below finds and only finds that the defendants in the former suit violated their agreement, not that they had committed a wrong independently of contract. This finding does not prevent the present suit. See *Power* v. *Hoerz* (1).

P. O'K. *Appeal allowed and case remanded.*

CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Beverley.

1886 *August 3.*

IN THE MATTER OF KALA CHAND AND OTHERS (PETITIONERS) *v.* GUDADHUR BISWAS AND OTHERS (OPPOSITE PARTIES)*

Compensation—Cattle Trespass Act, 1871, *ss.* 20, 22—*False complaint.*

A complaint was made against certain persons under s. 20 of the Cattle Trespass Act of 1871, charging them with having illegally seized and detained the complainant's cattle. The Assistant Magistrate who heard the complaint found it to be false, and he ordered the complainant to pay Rs. 20 compensation to the accused, and in default to suffer simple imprisonment for 21 days. On application to the High Court,—

Held, that the order was illegal and must be set aside.

IN this case Kala Chand Sheikh and others charged Gudadhur Biswas and others, under the provisions of s. 20 of the Cattle Trespass Act, Act I of 1871, before the Assistant Magistrate of Meherpore, with having illegally seized and detained their cattle. The complaint was investigated by the Assistant Magistrate and found to be false. He acquitted the accused under s. 245 of the Code of Criminal Procedure. He directed that each of the complainants should pay to the accused

* Criminal Revision Case No. 313 of 1886, against the order passed by Mr. J. Crawfurd, Sessions Judge of Nuddea, dated the 5th June 1886, rejecting the order of Mr. Hewling Luson, Assistant Magistrate of Meherpore, dated the 9th April 1886.

(1) 19 W. R. (Eng.) 916.